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No. 08-53

Supreme Court, U.S.
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In The

Supreme Court of the United States

HOLLY L. STAUNCH,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

MARTIN S. HUME
MARTIN S. HUME CO., L.P.A.
6 FEDERAL PLAZA CENTRAL
SUITE 905
YOUNGSTOWN, OH 44503
(330) 746-8491

Attorney for Petitioner Holly L. Staunch

August 25, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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PETITIONER'S REPLY BRIEF

I. THE DECISION OF THE SIXTH CIRCUIT IN THE PRESENT CASE CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN THE CASE OF *KOSAKOW V. NEW ROCHELLE RADIOLOGY ASSOCIATES.*

Continental argues that the decision of the Sixth Circuit in the present case is harmonious with the decisions of other courts of appeals. Continental specifically cites the case of *Kosakow v. New Rochelle Radiology Associates*, 274 F.3d 706 (2d Cir. 2001), as one of those "harmonious" cases. (Continental Brief at p. 15).

The contention that the *Kosakow* case is harmonious with the decision of the Sixth Circuit in this case is disingenuous. In *Kosakow*, the court held that genuine issues of material fact existed as to whether the employee arrived at work fifteen (15) minutes before the start of her shift each day, and what functions she performed during that time, precluding summary judgment as to whether such time could be counted in determining whether she worked the requisite hours to be covered under the FMLA.

The court in *Kosakow* stated as follows:

> Kosakow is not, however, necessarily claiming that the timesheets were inaccurate. To be precise, she does not dispute that her shift began at 8:00 a.m., nor does she argue that the timesheets are inaccurate insofar as they reflect

> the fact that her pay was based upon her shift beginning at 8:00 a.m. [FN1] To the contrary, her claim is that in order to fulfill her job responsibilities, it was necessary that she arrive at 7:45 a.m. despite the fact that her shift did not begin until 8:00 a.m. She argues that these fifteen minutes each morning should count towards her hours worked, despite the fact that they were not included in her paychecks or on her timesheets.
>
> **FN1. Because she is not actually challenging the documentary evidence, her affidavit alone should have been sufficient to create a genuine issue of fact.**
>
> We conclude that questions of fact exist concerning whether Kosakow arrived at 7:45 a.m. each day and what functions she performed in the fifteen minutes before her shift.

(emphasis added).

Like the plaintiff in the *Kosakow* case, who did not necessarily claim that her timesheets were inaccurate, Staunch did not claim that Continental's records were inaccurate. Rather, Staunch, like the plaintiff in *Kosakow*, claimed that Continental's records did not reflect all of the time she spent in service to her employer and offered her own affidavit to include the omitted time. Contrary to the argument of Continental that the decision in the *Kosakow* case was based upon the corroborating evidence submitted by two other employees, the court specifically stated in footnote 1, "Because she is not actually challenging the

documentary evidence, **her affidavit alone** should have been sufficient to create a genuine issues of material fact." (emphasis added).

Fair reading of the decisions of the Second Circuit in the *Kosakow* case and the Sixth Circuit in the present case can only lead to the conclusion that the two courts have reached conflicting opinions on the same important matter.

It is noteworthy that the other case cited by Continental, *Knapp v. America West Airlines*, 207 Fed. Appx. 896 (10th Cir. 2006), has been subject to severe criticism. See "Tenth Circuit Misperceives and Misapplies the Purpose of the FMLA," 73 J. Air L. & Com. 113, 119+ (2008). Even the *Knapp* decision, however, acknowledged that many of the hours of the type claimed by Staunch, such as active duty time, training time and layover time should be counted toward hours worked for determining eligibility under the FMLA. It was only reserve time, where the employee was not in active service to the employer, that the court found to be properly excluded.

The conflicting opinions of the Second and Sixth circuits, the criticism of the *Knapp* decision, and the deviation by the Sixth Circuit from established precedent under the cases decided under the Fair Labor Standards Act (which standards were expressly adopted by Congress when it enacted the FMLA), all lead to the conclusion that the present case is worthy of review by the Supreme Court.

II. STAUNCH IS NOT ASKING THE SUPREME COURT TO ENGAGE IN DETAILED EVIDENTIARY ANALYSIS.

Continental argues that the court should not grant Staunch's petition for certiorari because it is not the role of the Court to engage in fact finding and evidentiary analysis. In order to answer the questions presented in this case, it will not be necessary for the court to do so.

The Sixth Circuit held that in order to avoid summary judgment, Staunch was required to "produce evidence of the specific days and hours she worked" in order to meet the definition of "eligible employee" under the Family Medical Leave Act. The Court may hold that this is an improper standard, that places a greater burden on employees than Congress intended when it enacted the FMLA, without getting into the details of each party's submission. In order to decide this case, it is sufficient to note that there is conflicting evidence on the question of the number of hours worked by Staunch for Continental in the twelve months preceding her request for leave.

III. STAUNCH HAS NOT WAIVED ANY OF THE ARGUMENTS MADE IN HER PETITION FOR CERTIORARI.

Continental misperceives the reason why Staunch included in her petition for certiorari regulations demonstrating she was presumed to be an eligible employee under the FMLA pursuant to 29 C.F.R. §§ 825.110(d) and 825.500(f)(1). Although Staunch met the predicate for establishing that she was

presumed eligible under those sections, once Continental submitted the affidavit of Mary Sturchio contending that Staunch did not work 1250 hours in the twelve months preceding her request for leave, that issue became contested. As stated in the case of *Routen v. West*, 142 F.3d 1434 (C.A. Fed. 1998):

> The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption. *See 1 Weinstein's Federal Evidence* § 301.02[1], at 301-7 (2d ed. 1997); 2 *McCormick on Evidence* § 342, at 450 (John W. Strong ed., 4th ed. 1992). However, when the opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981); *A.C. Aukerman*, 960 F.2d at 1037 ("[A] presumption ... completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact."); *see also Weinstein's Federal Evidence* § 301App.100, at 301App.-13 (explaining that in the "bursting bubble" theory once the presumption is overcome, then it disappears from the case); 9 *Wigmore on Evidence* § 2487, at 295-96 (Chadbourn rev. 1981). *See generally* Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L.Rev. 195 (1953).

> The party originally favored by the presumption is now put to his factually-supported proof. This is because the presumption does not shift the burden of persuasion, and the party on whom that burden falls must ultimately prove the point at issue by the requisite standard of proof. *See* Fed.R.Evid. 301; *A.C. Aukerman,* 960 F.2d at 1038-39. *But see McCormick on Evidence* § 344, at 470-72 (describing an alternative to the bursting bubble rule in which application of a presumption shifts the burden of persuasion); Edmund M. Morgan, *Presumptions,* 12 Wash. L.Rev. 225 (1937).

In this case, Staunch contends that 29 C.F.R. § 825.110(d) does have the effect of changing the applicable burden of proof by placing the burden on the employer to prove that the employee did not work 1250 hours in the twelve months preceding her request for leave. The regulation states in relevant part, "An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not 'eligible' for FMLA leave." However, where evidence is submitted in support of each party's position, the burden of proof is essentially irrelevant to summary judgment analysis. The question is simply whether there is a genuine issue of material fact.

The purpose of including arguments regarding the presumption of eligibility as stated in the cited regulations is to make it clear that the Sixth Circuit misinterpreted the FMLA when it held that, in order to meet the definition of eligible employee, the

employee must produce evidence of the specific days and hours she worked in order to meet the definition of "eligible employee" under the Family Medical Leave Act. No such requirement is contained in the FMLA itself, or in the applicable regulations. The cited regulations are relevant and proper for the Court to consider when deciding the questions presented in this petition. Staunch has consistently maintained that she was an eligible employee under the FMLA and has not waived any arguments in support of that position.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, Staunch respectfully requests the court to grant her request to review the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

Martin S. Hume
Martin S. Hume Co., L.P.A.
6 Federal Plaza Central
Suite 905
Youngstown, OH 44503
(330) 746-8491

Attorney for Petitioner
Holly L. Staunch